U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 25 2010

SRC 07 281 53380

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

This petition, filed on July 27, 2007, seeks to classify the petitioner pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. At the time he filed the petition, the petitioner was working in the Division of Endocrinology in the School of Medicine at the University of North Carolina (UNC) at Chapel Hill. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director and the AAO found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel argues that the AAO overly-narrowed the petitioner's field, inappropriately excluding certain evidence, and that the submitted evidence demonstrates "the widespread and lasting evidence of his research in biological science."

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.--
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner received his Ph.D. in Animal Science from the University of Minnesota in 2005. The director and the AAO found that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't of Transp., 22 I&N Dec. 215, 216 (Comm. 1998) [hereinafter "*NYSDOT*"], has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the

field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As noted in the AAO's appellate decision, the petitioner received his Ph.D. in Animal Science from the University of Minnesota in 2005 and went to work as a postdoctoral research fellow at the University of North Carolina (UNC), the position he held at the time of filing the petition. Part 6 of the Form I-140, Immigrant Petition for Alien Worker, "Basic information about the proposed employment," states: "Investigation of IGF-I biological functions in smooth muscle cells under the hyperglycemia and oxidative conditions with the intention of preventing and curing vascular diseases in diabetes patients."

The petitioner's July 22, 2007 letter accompanying the petition specifically defines the area of substantial intrinsic merit in which he seeks employment:

> The area that Beneficiary/Petitioner seeks employment is [sic] substantial intrinsic merit. [The petitioner] is currently investigating IGF-I signal transduction in SMC under the different stress conditions, such as hyperglycemia and oxidative stress. . . . [The petitioner] is particularly interested in how high blood glucose alters arterial smooth muscle cell responses to IGF-I.

The petitioner's statements are corroborated by a July 19, 2007 letter from [redacted] the petitioner's postdoctoral supervisor in the Division of Endocrinology at UNC, stating that the petitioner is "studying why patients with diabetes have an increased incidence of heart attacks and the factors that predispose them to develop more extensive atherosclerosis compared to people who do not have diabetes."

The AAO's appellate decision found that "the petitioner works in an area of intrinsic merit, biological science, and that the proposed benefits of his work, *improved treatment of diabetes*, would be national in scope." [Emphasis added.] The AAO's decision specifically noted that IGF-I signal transduction and its relationship to atherosclerosis in diabetes "is the area in which the petitioner proposes to continue" his work. The AAO's decision addressed the reference writers' discussion of the petitioner's work at the University of Minnesota and the UNC, but found that their letters failed to explain how his work had already impacted the field. The AAO's decision stated:

> The petitioner's most extensive research, including citations, however, relates to animal nutrition, not diabetes. [redacted] does not adequately explain how the petitioner's work with animal nutrition projects his success as a medical researcher. We acknowledge that the petitioner's doctoral research, while involving animal science, did involve insulin-like growth factors and, thus, is somewhat related to his current research. The petitioner's doctoral research, however, is not as widely cited as his research on animal nutrition.

* * *

The . . . references provide general praise of the petitioner's work and the importance of his area of research, but fail to explain how the petitioner's work is already impacting the field. Most significantly, the letters from [redacted], Dean of the University of Virginia's School of Medicine; [redacted], an associate professor at Ciudad Universitaria in Madrid, and [redacted] a research Biologist at the Beltsville Human Nutrition Research Center, are in response to a request for the authors to review the petitioner's curriculum vitae and provide an opinion. None of these researchers claim to have ever heard of the petitioner or his work prior to being contacted for a reference letter. We note that the specifics of the petitioner's research have been included within [redacted] letter in a significantly different font than the rest of the letter.

The evidence of citation as of the date of filing does not demonstrate that any one of the petitioner's articles reporting his research at the University of Minnesota or the University of North Carolina had been cited more than seven times as of the date of filing with some additional citations after that date. While citations are notable, in the absence of letters that provide examples of the petitioner's influence, we must look to the citations themselves. Many of the citations reviewed by this office are not indicative of the petitioner's unique influence, with several of the articles citing the petitioner's work together with several other articles for the same proposition. For example, [redacted] cites the petitioner and two other articles for the proposition that "TBA increased circulating levels of IGF-I and autocrine synthesis of the growth factor."

The record reflects that the petitioner's work in China, before obtaining his Ph.D., is well cited and was recognized with a provincial award, but the record lacks an explanation of this impact. Regardless, the petitioner's past record must justify projections of future benefit to the national interest. *Id.* at 219. As the petitioner intends to pursue research on diabetes, it is not clear that his past research on animal nutrition is particularly indicative of his ability to benefit the national interest through his future research. The petitioner's research in the area that he intends to pursue in the United States is not documented to have been notably influential. While this work has been cited, the letters in the record mostly discuss the importance of the petitioner's area of research and speculate as to the future significance of this work rather than provide an explanation as to how this work has already had some degree of influence.

On motion, counsel argues that the petitioner's "contributions to animal nutrition, skeletal muscle growth and development, and IGF-I signal transduction and its relationship to atherosclerosis in diabetes, are in the same field that is 'biological science.'" Counsel further states: "It is error to over-narrowly define [the petitioner's] field of research by three different fields. This narrow definition of research field is not supported by any precedents, previous AAO decisions, court rulings or the DOL [Department of Labor] *Occupational Outlook Handbook*." According to the information for "Biological Scientists" submitted from the *Occupation Outlook Handbook*, this occupational cluster comprises multiple fields of study as diverse as zoology, microbiology, marine biology, and biophysics. The argument that a researcher who demonstrates significant achievement in one of these fields of study should automatically be considered to have a track record of success in any of the remaining fields is not persuasive. Counsel cites a non-precedent decision by this office

and a federal district court decision, *Buletini v. INS,* 860 F. Supp. 1222 (E.D. Mich. 1994), in support of his contention that the AAO erred by narrowing the petitioner's field. Both of these cases are non-binding and relate to a wholly different visa classification for aliens of extraordinary ability. Nevertheless, the AAO's appellate decision addressed the petitioner's past record of achievement in all three of the petitioner's research specialties. Moreover, the AAO properly evaluated the petitioner's evidence as it relates to the improved treatment of diabetes, the research area in which the petitioner seeks employment and in which he proposes to benefit the United States.[1] *See NYSDOT*, 22 I&N Dec. at 217.

Counsel asserts that the petitioner's field should "be characterized by the commonly offered degree," citing *Buletini v. INS,* 860 F. Supp. at 1230. The petitioner's motion includes academic transcripts showing his coursework for his M.S. degree with a major in Animal Physiology and for his Ph.D. in Animal Sciences. Counsel asserts that the preceding coursework equates to a commonly offered degree in the field of "biological research," but the record does not include an independent educational evaluation to support this claim. Nevertheless, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Buletini*, 860 F. Supp. at 1229, found that the director inaccurately categorized the alien too narrowly "as a scientific researcher in the field of nephrology, rather than as a doctor of medicine." In that case, the court was interpreting the statutory requirement that the alien "continue work in the area of extraordinary ability." In the present matter, the petitioner has not established that his past research in animal nutrition or skeletal muscle growth and development demonstrates a significant benefit to the U.S. national interest in diabetes research, the area in which the petitioner seeks employment. Even if we were to conclude that the petitioner's area of intrinsic merit is biological science, the record reflects that the petitioner intends to pursue diabetes research rather than animal nutrition or skeletal muscle growth and development research.

Moreover, counsel's assertion the the AAO's decision was not supported by standing precedent is incorrect. As previously discussed, *NYSDOT*, 22 I&N Dec. at 217 set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. In *NYSDOT*, it was found that the area of intrinsic merit was not simply "engineering," but rather "engineering of bridges." *Id.* Next, it must be shown that the proposed benefit will be national in scope. *Id.* In the cited matter, the proposed benefit of the alien's employment was the proper maintenance and operation of New York's bridges and roads. *Id.* Accordingly, the AAO's analysis of the petitioner's past history of achievement relating

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[1] As previously noted, Part 6 of the Form I-140, Immigrant Petition for Alien Worker, "Basic information about the proposed employment," states: "Investigation of IGF-I biological functions in smooth muscle cells under the hyperglycemia and oxidative conditions with the intention of preventing and curing vascular diseases in diabetes patients."

to the improved treatment of diabetes, the area in which he seeks employment and in which he proposes to benefit the United States, was clearly not in error.

The petitioner's motion includes letters from [redacted] and two others explaining how expertise in animal physiology and growth biology equips the petitioner with skills advantageous to the pursuit of diabetes research. None of these letters cite to specific examples of how the petitioner's research in animal nutrition or animal physiology have significantly impacted diabetes research. With regard to the petitioner's knowledge and skills in animal nutrition and pig physiology, objective qualifications necessary for the performance of a research position can be articulated in an application for alien labor certification. Pursuant to *NYSDOT*, 22 I&N Dec. at 221, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training, education, or experience that could be articulated on an application for a labor certification.

[redacted] Diabetes and Bone Diseases, Mount Sinai School of Medicine, states:

> Diabetes is a metabolism disorder disease that requires researchers to have expertise in animal nutrition and physiology. A scientist who has extensive knowledge and skills in animal nutrition and physiology, like [the petitioner], has an advantage to understand the course of diabetes and to perform the animal studies, consequently, accelerating the process for development a new method or a new drug. In addition, the basic knowledge and techniques in physiology are applicable in both animal and human health, including animal nutrition and diabetes research. In other words, the fundamental skills that [the petitioner] used in his animal nutrition research, such as animal trials, experimental design, samples analysis, statistic analysis, data interpretation and logical thinking, are also required and critical for his current research in diabetes.

[redacted] at Albert Einstein College of Medicine, states:

> Diabetes mellitus is a complex metabolic disorder that requires researchers to have considerable expertise in animal nutrition and physiology. . . . A scientist who has extensive knowledge and skills in animal nutrition and physiology, like [the petitioner], has a great advantage in understanding the course of diabetes and the ability to perform appropriate animal studies, consequently accelerating the process for development of a new method or a new drug. In addition, basic knowledge and techniques in physiology, such as animal trials, experimental design, samples analysis, statistic analysis and data interpretation, are applicable in both animal and human health, including animal nutrition and diabetes research. The training and skills that [the petitioner] uses in his animal nutrition research are required and critical to the U.S.'s currently funded research in diabetes.
>
> Based on his previous experience and current studies, I am very confident to say that diabetes studies benefit from scientists like [the petitioner], whose background in animal science will enhance his contribution toward American diabetes research.

[redacted] states:

> [The petitioner's] training as an animal physiologist was not only applicable to what we do but was an advantage over other postdoctoral fellows that are trained only in human health because they have no understanding of pig physiology.
>
> * * *
>
> I do not see the fact that he trained in animal health to obtain his M.S. and Ph.D. degrees and in human health for his postdoctoral training as an impediment to a career in either discipline.

With regard to the comments from [redacted] and [redacted] it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. *NYSDOT*, 22 I&N Dec. at 221. While the petitioner has experience with animal models based on his prior work in animal nutrition and skeletal muscle growth and development, there is no indication that this work was frequently cited by diabetes researchers or otherwise relates to the improved treatment of diabetes, the research area in which the petitioner seeks employment and in which he proposes to benefit the United States. Obviously, the petitioner's previous use of animal models and past experience in animal physiology helped him qualify for his position at UNC, but there is no evidence demonstrating that his work has influenced human diabetes research to a significant degree.

The petitioner's motion included material showing the popularity of pigs as a readily available research model for studying and understanding human diseases. Counsel states that "pig models are widely used in diabetes research in laboratories across the nation and worldwide." The record, however, does not contain evidence showing that the petitioner's swine nutrition research studies have significantly influenced diabetes research.

Counsel further argues: "As a result of the over-narrow definition of [the petitioner's] field of research, crucial evidence of his contributions to the field of biological science with different focuses in animal physiology and growth biology was inappropriately excluded." Counsel's claim that the petitioner's work in animal physiology and growth biology was inappropriately excluded is not supported by the record. The AAO specifically acknowledged the petitioner's prior work in China relating to animal nutrition and skeletal muscle growth and development, but found that such work did not establish his exemption from the requirement of a job offer based on the national interest. In addressing this work, the AAO's decision stated:

> In 1998, the petitioner received the second grade Zheijiang Provincial Science and Technology Advancement Award for his project "Development and Marketing of Nutrients Partition Additive (Betaine) for Livestock." The petitioner's 1999 article on the effect of exogenous enzyme preparations on activity of endogenous digestive enzymes in livestock has been cited 50 times; his 2000 article on the growth response of pigs fed a pharmacological level of copper has been cited 24 times and his 1998 article on the effect of neutral protease on mtrogen utilization and activities of endogenous digestive enzymes in

domestic bison has been cited 14 times. Two additional articles published in China have been cited 12 and 7 times. The remaining articles published while the petitioner was a researcher in China have been cited no more than five times.

- The provincial recognition and citation certainly suggest an interest in the petitioner's research in China. This evidence, however, would have been bolstered by letters from researchers with first hand knowledge of the influence of this work explaining why this work was significant and original and how it was actually applied in China. Moreover, the record lacks evidence that this research is relevant to the U.S. national interest or that the petitioner will continue to benefit the national interest on animal nutrition as he is no longer pursuing this research.

We reaffirm our prior findings. The evidence submitted on motion does address the preceding deficiencies. For instance, the petitioner has not submitted evidence of specific examples where his research was actually applied in China.

Counsel states that the petitioner's appellate submission included "an updated citation record of his work with at least 34 worldwide independent citations to his English publications." As noted in the AAO's appellate decision, the evidence of citation as of the date of filing does not demonstrate that any of the petitioner's articles reporting his research at the University of Minnesota or the UNC had been cited more than seven times as of the date of filing. Many of the independent citations submitted on appeal post-date the filing of this petition. The articles citing to the petitioner's work after July 27, 2007 do not constitute evidence that his diabetes research was already influential as of that date. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). In this matter, that means that the petitioner must demonstrate his track record of success with some degree of influence in his specialty as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008). Accordingly, while citations published after the date of filing may serve as evidence of the continued relevance of an alien's work that had already been well cited as of the filing date, they cannot be considered evidence that the alien was already influential as of that date. To hold otherwise would have the untenable result of an alien securing a priority date based on the speculation that his work might prove influential while the petition is pending. Accordingly, the AAO will not consider cites to the petitioner's work from August 2007 and later in this proceeding.

Citations are not the only means by which to show the petitioner's impact on his field. Independent witness letters can play a significant role in this respect. In these proceedings, however, the petitioner has submitted only a few such letters, which, as discussed in the AAO's previous decision and in the present matter, collectively fail to establish the depth or extent of his influence in his current field of research. Simply listing the petitioner's novel findings cannot suffice in this regard, because all graduate students and postdoctoral researchers are arguably expected to produce original work. With further regard to the letters of support, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from individuals selected by the petitioner is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). In this case, the content of the letters of support submitted by the petitioner does not establish that his diabetes research at the time of filing had already had a significant national impact or otherwise influenced his field as a whole.

While petitioner has contributed to human diabetes research during the course of his postdoctoral training at UNC, he has not established that his past record of achievement in this area is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. We note here that the national interest waiver contemplates that the petitioner's influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.")

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The AAO's June 11, 2009 decision dismissing the appeal is affirmed. The petition will remain denied.